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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DOUGLAS KEANE.

CASE NO. C 07-06074 EMC ECF

Plaintiff.

**PLAINTIFF AND DEFENDANTS'
JOINT CASE MANAGEMENT
STATEMENT**

vs.

ATLAS HOSPITALITY GROUP,
HEDMARK VIII, LLC and
WESTLAND FINANCIAL III, LLC and
JUSTIN B. MEYERS.

Date: March 19, 2008
Time: 10:30 a.m.
Courtroom: C

Defendants.

AND RELATED COUNTERCLAIMS

1 Pursuant to this Court's Local Rules, plaintiff and defendants/counterclaimants submit
2 this Case Management Statement for the consideration of this Honorable Court.
3

4

I. JURISDICTION AND SERVICE.

5 The matter was originally filed in the Sonoma County Superior Court and removed to this
6 Court on November 30, 2007. The parties dispute whether this Court has subject matter
7 jurisdiction. Plaintiff has filed a Motion to Remand, set for hearing on March 19, 2008.
8 Defendants assert that subject matter jurisdiction is based on the Copyright Act, 17 U.S.C. §301.

9 Venue is proper in the Northern District of California, San Francisco Division because it
10 is the federal court located where the removed state action was pending. 28 U.S.C. §1441(a).
11 Plaintiff and defendants are unaware of any issues concerning venue or personal jurisdiction.

12

II. FACTS

13

A. Statement by Plaintiff

14 Plaintiff Douglas Keane is the executive chef and owner of Cyrus Restaurant, located in
15 the same building as the Les Mars Hotel in Healdsburg, California. Cyrus Restaurant rents its
16 restaurant space from Defendants Hedmark VIII, LLC and Westland Financial III, LLC, the
17 owners of Les Mars Hotel. In early July 2007, Mr. Keane learned that Defendants authorized
18 and created a sales prospectus offering the Les Mars Hotel for sale, which they distributed to
19 prospective buyers. Mr. Keane also learned that two pages of the sales prospectus featured his
20 name and image to promote the sale of the hotel. On July 13, a representative of Mr. Keane
21 contacted Defendant Atlas Hospitality Group to inquire about the use of his name and image, and
22 to request a copy of the sales prospectus. Plaintiff subsequently obtained a copy of the
23 prospectus, and, upon confirming that it contained his name and image, filed suit in the Superior
24 Court of the State of California, County of Sonoma. Defendants Hedmark VIII, LLC and
25 Westland Financial III, LLC countersued, alleging that the contents of the sales prospectus was a
26
27
28

1 “trade secret” that Mr. Keane wrongly disclosed in his complaint, and that disclosure of the sales
 2 prospectus in the complaint constituted interference with prospective business advantage.
 3

4 **B. Statement by Defendant**

5 Plaintiff is chef and a part-owner of Cyrus Restaurant, which is located on the first floor
 6 of the Hotel and operates under a long-term lease with Hedmark/Westland. Atlas Hospitality
 7 prepared a 31-page Confidential Offering Memorandum for the potential sale of the Hotel, which
 8 included financial information regarding the Hotel, improvements, and Cyrus Restaurant. Atlas
 9 provided the Prospectus to eight qualified prospective buyers that signed Nondisclosure
 10 Agreements. The Prospectus itself contained a Confidentiality and Disclosure Statement on its
 11 first page. Neither Plaintiff nor the entity that owns Cyrus (Hburg Restaurants, LLC) signed
 12 Nondisclosure Agreements or were approached by Atlas as prospective purchasers.
 13

14 The Prospectus contains truthful information regarding Cyrus Restaurant, consisting
 15 solely of previously published restaurant reviews, excerpts from Cyrus’ website, and a summary
 16 of the lease terms between Westland/Hedmark and Cyrus. Plaintiff, having somehow obtained a
 17 copy of the Prospectus, filed suit against Atlas and Hedmark/Westland, alleging that because the
 18 published reviews and website excerpts included Plaintiff’s name and image, their republication
 19 and distribution violated Plaintiff’s privacy and publicity rights. Defendants counterclaimed,
 20 asserting that Keane acquired the Prospectus through improper means, and intentionally
 21 disclosed its contents, despite Defendants’ efforts to maintain the confidentiality of the
 22 Prospectus.
 23

24 **III. LEGAL ISSUES**

25 Plaintiff asserts eight causes of action alleging violations of Calif. Civil §3344 (use of
 26 another’s name, photograph or likeness for advertising, selling or soliciting purchases of goods
 27 or services), and one common law claim for Appropriation of Right of Publicity for Commercial
 28

1 Purposes. Plaintiff asserts that Defendant's counterclaims are retaliatory suits barred by
2 California Code of Civil Procedure § 425.16, that disclosures made in Mr. Keane's complaint are
3 privileged pursuant to California Civil Code § 47, and that as a matter of law and fact, the hotel
4 sales information was not a trade secret.

5 Defendants assert that Plaintiff's claims are all preempted by the Copyright Act, that the
6 publication of the prospectus is not a violation of either the statutory or common law claims
7 asserted by Plaintiff, that publication of the prospectus gives rise to a single (rather than eight)
8 claims, and that Plaintiff suffered no damage. Defendants have filed Counterclaims against the
9 Plaintiff, alleging misappropriation of trade secrets and interference with prospective business
10 advantage. Counterclaimant's claims allege that Plaintiff acquired the prospectus through
11 improper means and disclosed the contents and existence of the prospectus.

12 IV. MOTIONS

13 Plaintiff's Motion to Remand is currently pending before the Court. The hearing is set
14 for March 19, 2008. Plaintiff anticipates filing a motion to strike all counterclaims pursuant to
15 C.C.P. § 425.16 or, in the alternative, motions for judgment on the pleadings pursuant to
16 F.R.C.P. 12(c).

17 Defendants anticipate filing a Motion to Dismiss seven of the eight statutory claims
18 arising under Civil Code §3344, on the ground that the statute allows only one cause of action
19 arising from distribution of a single publication. Defendants also anticipate filing a Motion for
20 Summary Judgment/Partial Summary Judgment on the grounds that Plaintiff's claims are all
21 preempted by the Copyright Act, and that Plaintiff cannot establish facts constituting violations
22 of the statutory or common law claims asserted in the Complaint.

23 V. AMENDMENT OF PLEADINGS

24 Plaintiff is conducting research to determine whether it would be appropriate to amend its
25 complaint to reduce the number of causes of action for violations of Civil Code § 3344 from
26 eight, down to either one or two causes of action for violations of Civil Code § 3344.
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28

VI. EVIDENCE PRESERVATION

The parties and their counsel have taken affirmative steps to preserve evidence related to the issues presented by the instant action, including but not limited to, those set forth in F.R.C.P. 26(d).

VII. DISCLOSURES

The parties exchanged their initial disclosures pursuant to F.R.C.P. 26(a) on February 27, 2008. At this time, the parties do not contemplate seeking special orders regarding additional discovery.

VIII. DISCOVERY AND SCHEDULING

No discovery has been taken to date. The parties have not stipulated to any discovery limits differing from the Federal Rules of Civil Procedure at this time. The parties respectfully request that the Court withhold setting deadlines until the Early Neutral Evaluation session is complete and a further Case Management Conference is conducted.

In the event that the Early Neutral Evaluation does not lead to settlement, Plaintiff requests that a further Case Management Conference be scheduled approximately 60 days after the Initial Case Management Conference to set a discovery schedule and trial date.

IX. RELIEF

Plaintiff seeks attorneys fees under Civil Code § 3344, statutory damages in the amount of \$6000, disgorgement of profits obtained by Defendants, at least \$7500 for the fair market value of Plaintiff's services (based on his average appearance fee in 2007), general damages, and punitive damages. Plaintiff also seeks, pursuant to Cal. Civ. Code § 3426.4, all attorney fees incurred by Plaintiff in defending Defendant's bad-faith Uniform Trade Secrets Act claim. Counterclaimant seeks general damages, attorney's fees, and exemplary damages.

X. SETTLEMENT AND ADR

Plaintiff has executed a settlement agreement with Defendants Atlas Hospitality Group and Justin Meyers, and anticipates filing a stipulated dismissal of claims with respect to those

1 defendants the week of March 10, 2008. On February 5, 2008, Hedmark/Westland made a
 2 settlement demand to Plaintiff/Counterdefendant. On February 12, 2008, Plaintiff extended a
 3 settlement demand to Defendants Hedmark VIII, LLC and Westland Financial III, LLC.
 4

5 The parties have stipulated to Early Neutral Evaluation. No date has been set.

6 **XI. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

7 The parties have consented to disposition and trial of this action by a magistrate judge.

8 **XII. TRIAL**

9 Plaintiff, Defendants and Counter defendants have demanded a jury trial.

10 **XIII. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

11 Plaintiff certifies that other than the parties, the following persons, associations, firms,
 12 partnerships, corporations, or other entities other than the parties may have a financial interest in
 13 the subject matter in controversy or other interest that could be substantially affected by the
 14 outcome of the proceeding: David Mars and Sarah Mars, principals of Defendants Hedmark
 15 VIII, LLC and Westland Financial III, LLC. Plaintiff and Defendants have filed a "Certification
 16 of Interested Entities or Persons," as required by Civil Local Rule 3-16.

18 Dated: March 12, 2008

MERRILL, ARNONE & JONES, LLP

20 /s/ ROSS B. JONES

21 Attorneys for Defendants/Counterclaimants

22 Dated: March 12, 2008

KEANE LAW FIRM

24 /s/CHRISTOPHER JAMES KEANE

25 Attorneys for Plaintiff

26 Dated: March 12, 2008

FOLGER LEVIN&KAHN, LLP

27 /s/JOEL D. SMITH

28 Attorneys for Plaintiff